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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In Banc

FARMERS INVESTMENT COMPANY, a corporation,

Appellant,

-vs-

ANDREW L. BETTWY, as State Land Commissioner, and the STATE LAND DEPARTMENT, a Department of the State of Arizona, and PIMA MINING COMPANY, a corporation,

Appellees.

FARMERS INVESTMENT COMPANY, a corporation,

Appellant,

-vs-

THE ANACONDA COMPANY, a corporation; AMAX COPPER MINES, INC., THE ANACONDA COMPANY as partners in and constituting ANAMAX MINING COMPANY, a partnership,

Appellees.

CITY OF TUCSON, a municipal corporation,

Appellant,

-vs-

ANAMAX MINING COMPANY, and DUVAL CORPORATION and DUVAL SIERRITA CORPORATION,

Appellees.

NO. 11439-2

AMICI CURIAE BRIEF
OF W. W. JARVIS, ET AL

INTRODUCTION

JARVIS, et al (hereinafter called Jarvis), Petitioners in Cause No. 9488 entitled *Jarvis v. State Land Department and the City of Tucson*, have asked leave to file a brief as *amici curiae* herein solely for the purpose of asking the Court to clarify some of the statements that are made in the majority opinion which would appear to be in conflict with the three *Jarvis* decisions rendered by this Court in 1969, 1970 and 1976, commonly referred to as *Jarvis I*, *Jarvis II* and *Jarvis III*, respectively, reported in: 104 Ariz. 527, 456 P. 2d 385; 106 Ariz. 506, 479 P. 2d 169; and ____ Ariz. ____, 550 P. 2d 227, respectively, and *State v. Anway*, 87 Ariz. 206, 349 P. 2d 774 (1960).

The JARVIS farmers are most grateful and appreciative of the Court's respective decisions which have protected their vested property rights in Avra Valley which rights could have otherwise been completely destroyed by the unlimited withdrawal and transportation of ground waters from the Marana Critical Area in the Avra-Altar Water Basin to areas outside thereof by Tucson or by other large users.

This Court by three unanimous decisions in the *Jarvis* series has established a constitutionally protected inviolate rule of property insofar as JARVIS and others similarly situate are concerned. A first reading of the majority opinion rendered herein would indicate that the Court had only restated the principles of law clearly announced in *Bristor v. Cheatham*, 75 Ariz. 227, 225 P. 2d 173 (1953) and the three *Jarvis* decisions. However further reading and studying of the opinion has caused a feeling of apprehension by JARVIS that perhaps the majority opinion herein gives

cause for concern as to its effect on the *JARVIS* decisions, such as when on Page 15, after citing *Jarvis II*, it is stated:

> "* * * Those cases are not, however, precedent for a doctrine that a court will prefer one economic interest over another on an ad hoc basis where there are not enough of the material goods of existence to go around. Rather, courts will protect rights acquired in good faith under previous pronouncements of the law. *If it is to the State's interest to prefer mining over farming, then the Legislature is the appropriate body to designate when and under what circumstances such economic interest will prevail."* (Emphasis supplied.)

and in holding that the Superior Court's finding No. 2 of May 21, was in error, states on Page 14:

> "* * * Water may not be pumped from one parcel and transported to another *just because both overlie the common source of supply* if the plaintiff's lands or wells upon his lands thereby suffer injury or damage." (Emphasis supplied.)

and when it is stated on Page 12 of the opinion that under *Bristor II* one

> "* * * could not convey pumped waters 'off the land' or 'off his land,' * * * "

to other places of use when this is exactly what the Court authorized in *Jarvis II* in relation to Tucson furnishing water to Ryan Field, and which the Court would have permitted Tucson to do by furnishing customers residing outside the critical area but within the Avra-Altar Valley Drainage or Water Basin *if it could have been shown to the satisfaction of the Court* by Tucson that the place of use by the customers would have been overlying the common source of supply or same *water basin* so as to come within the principle applicable to Ryan Field (479 P. 2d 169, at 173).

A review of the record and the briefs submitted to this Court by the mining companies discloses that the mining companies purchased as a result of the *Jarvis* decisions, and particularly *Jarvis II*, former agricultural land within the critical areas and retired

such land from cultivation.

It appears that altogether the mining companies purchased or own within the Sahuarita Continental Groundwater Basin some 43,170 acres of land, of which some 21,785 acres are within the exterior boundaries of the Sahuarita Continental Critical Ground Water Area. Of this total acreage purchased by the mines it appears that approximately 7,363 acres have an irrigation history and have been retired from such use (See Pages 4 and 5 of Duval's Brief). For instance, Pima has purchased and retired agricultural land which formerly used 7,000 acre feet of water per year (Page 19 Appellee Pima's Brief) and Duval has purchased and owns 9,430 acres in the Sahuarita Continental Ground Water Subdivision of which 7,443 acres are within the exterior boundaries of the critical area and 1,530 acres thereof have a former irrigation history and are retired from cultivation (See Duval's Brief, Pages 4 and 5 and also Page 22 of Decision).

On the other hand, while Tucson owns some thirty wellsites in the critical area, each approximately consisting of 2½ acres, and pumps approximately 11,000 acre feet per year, it has no retired agricultural land from which it pumps its waters and apparently has no intention and no plans to buy and retire such agricultural land (See Page 4 Duval's Brief).

At the time of oral argument there was presented as EXHIBIT G by Duval, which exhibit is part of the Court's file, a large, colored map entitled: DUVAL CORPORATION UPPER SANTA CRUZ LAND STATUS (See reproduced small copy attached as Appendix A to Petition of Duval for Leave to Intervene and to File Brief Amicus Curiae,) This map clearly shows the boundary lines of the drainage area, the Sahuarita-Continental Critical Ground Water Area which also shows by

coloring the lands owned and irrigated by Farmers Investment Company; the City of Tucson lands (the smaller dots being the 2½ acre wellsites); the mining company lands; and the mining company lands retired from agriculture. It however does not show the State of Arizona leased lands in the area, some of which are leased by Pima and on which lands some of Pima's wells are located and which lands were the subject of a decision by this Court in *Farmers Investment Company v. Pima Mining Company, State Land Department, et al*, 111 Az. 56, 523 P. 2d 487, No. 11439, which involved the legality of Pima's Commercial Lease No. 906 on state lands which leased ground water for mining purposes.

With this background in mind, JARVIS is concerned therefore as to:

1. Whether or not the three decisions of this Court in *Jarvis*, and particularly *Jarvis II* and *III*, establish "*a rule of property*" or only "*the law of the case*," limited to the relative respective rights of JARVIS and the City of Tucson in this particular groundwater area.

2. Whether or not the decisions by this Court in the three *Jarvis* cases have been affected by the majority opinion in this case to the extent that *legislation may be required* to clarify, modify, ratify or abrogate the three *Jarvis* decisions of this Court.

3. Whether or not the rule adopted in *Jarvis II* would apply to uses other than municipal and domestic;

4. Whether or not the decision by this Court in *Jarvis II* relating to the furnishing of water to Ryan Field or persons residing outside the critical area but within the same water basin or common supply for all purposes except agriculture from Tucson's wells located on *other* parcels of land within a critical area has been abrogated by

the majority opinion in this case; and

5. Whether or not a farmer whose irrigation wells are located on one parcel of land can irrigate his qualified non-contiguous parcel of land from such wells; and

6. Whether or not this Court's decision in *State v. Anway*, *supra*, authorizing the change in place of use of irrigated lands from a qualified irrigation well which new place of use may be separated from the wellsite has be abrogated and repealed.

DISCUSSION

- I -

WHETHER OR NOT THE THREE DECISIONS OF THIS COURT IN *JARVIS*, AND PARTICULARLY, *JARVIS II AND III*, ESTABLISH "A *RULE OF PROPERTY*" OR ONLY "THE *LAW OF THE CASE*," LIMITED TO THE RELATIVE RESPECTIVE RIGHTS OF JARVIS AND THE CITY OF TUCSON IN THIS PARTICULAR GROUNDWATER BASIN AND CRITICAL GROUNDWATER AREA.

There is no question but that the *Bristor II*, *supra*, decision and the *Jarvis I*, *supra*, decision established a rule of property recognizing that vested rights of farmers to the ground-water supply underlying their lands within the Avra-Altar Valley within the exterior boundaries of the Marana Critical Ground Water Area were constitutionally protected when this Court enjoined Tucson from pumping and transporting water from their wells to areas outside the critical ground water area.

This property right as established by *Jarvis I* was recognized by the Court in *Jarvis II* (459 P. 2d at 173). However, equitable consideration persuaded the Court by unanimous decision, in following the suggestions in the concurring opinion of Justice MacFarland in *Jarvis I* (456 P. 2d at 393), to authorize the City to withdraw and transport an amount of ground water equal to the annual historical maximum use of agricultural lands if Tucson would acquire the same and retire them from cultivation.

As a result of *Jarvis II*, Tucson did acquire 3,166 acres of land formerly used for agricultural purposes, retired them from cultivation and petitioned this Court for modification of the unjunction accordingly. Inasmuch as JARVIS and Tucson could not agree on the amount of water that could be withdrawn and transported, the Court appointed a Master and as a result of the Master's Findings, the *Jarvis III* decision which established guidelines in determining the amount of water that Tucson could pump and transport out of the critical area under *Jarvis II* was entered by the Court. While the three *Jarvis* decisions were a result of an original proceeding in this Court there is no indication in any of the three decisions that the rules pronounced therein by the Court were to be limited in application and be the *law of the case* only in relation to JARVIS and the City of Tucson in the Avra-Altar Valley, particularly when oral argument was heard on *Jarvis III* at the same time and place as oral argument was heard in the *FICO* cases.

However, it now appears that the majority opinion has placed a cloud of doubt over the application of the established *Jarvis* rules of property and the exception to the rule as established by *Jarvis II* and *III*. It has always been felt by JARVIS, Tucson and the State Land Department that the *Jarvis* decisions have established a rule of property of state-wide application and not limited to the farmer versus municipality or the Avra-Altar Valley and the Marana Critical Ground Water Area.

DISCUSSION II AND III

- ii -

WHETHER OR NOT THE DECISIONS BY THIS COURT IN THE THREE *JARVIS* CASES HAVE BEEN AFFECTED BY THE MAJORITY OPINION IN THIS CASE TO THE EXTENT THAT *LEGISLATION MAY BE REQUIRED* TO CLARIFY, MODIFY, RATIFY OR ABROGATE THE THREE *JARVIS* DECISIONS OF THIS COURT.

- III -

WHETHER OR NOT THE RULE ADOPTED IN *JARVIS II* WOULD APPLY TO USES OTHER THAN MUNICIPAL AND DOMESTIC.

While it is recognized that the Court in *Jarvis II* looked to legislative policy as expressed by A. R. S. 45-417, in establishing the relative value of uses and appropriable waters as a guideline for modifying its decree of *Jarvis I* it clearly appears that the basic reason for the modification of the original decree was based upon equitable principles and the fact that the farmer would not be injured any more than if the land continued in cultivation and this is particularly true when the Court in *Jarvis III* defined what it meant by its statement in *Jarvis II*: "Tucson may withdraw an amount equal to the annual historical maximum use upon the land so acquired" by limiting Tucson's withdrawal to the former *consumptive use* by the farmer for the growing of his crops *over an average period of time* and injected into the decision the recharge factor by saying that any amount of water used by the farmer over and above the consumptive use of the crop was not to be transported out of the critical area by Tucson, but would remain in the ground.

The majority opinion in passing upon Tucson's rights herein, apparently leaves in doubt whether or not Tucson could as described in *Jarvis II* purchase and retire agricultural land and withdraw and transport waters therefrom under the guidelines established in *Jarvis III*. A clarification of the majority opinion in this regard would remove any doubt that the *Jarvis* decisions are not only alive and viable but applicable to areas other than the Avra-Altar Valley and the Marana Critical Ground Water Area.

As to the application of the *Jarvis* rule to mines or other

types of similar uses no comment whatsoever is made by the majority opinion as to the applicability of the equitable principle established in *Jarvis II* although it is clear from the records that the mines have acquired some 7,363 acres of lands within the Critical Ground Water Area which have an irrigation history and have been retired from cultivation.

To the contrary it appears that the majority opinion indicated by the language quoted above (Page 15 of the Opinion) that if the mines want to take advantage of the *Jarvis II* decision they must seek legislative relief rather than relief from this Court.

We do not believe that the majority opinion intended such an interpretation for if it had so intended, it would have clearly pointed out that *Jarvis II* was not applicable to the mines or any other user except domestic and municipal, otherwise it would not have remanded back to the trial court issues raised by Duval and Pima which clearly relate to former agricultural land now retired and used by the mines elsewhere than at the well head.

The suggestion of legislation flashes "a red alert" danger signal which could result in hasty disorganized and undoubledly unconstitutional "emergency--gung ho" legislation requiring years of additional expensive litigation by the farmers and other users and which undoubtedly would have a punitive effect on existing rights which apparently the mining companies thought they were buying when they purchased agricultural lands and retired them from cultivation under the guidelines established by *Jarvis II* under the honest belief that the rule therein stated was applicable to any other type of user under similiar circumstances.

In *Jarvis II* the Court relied upon the provisions of A. R. S.

Section 45-147 fixing a relative value of appropriative uses as a guideline to exercising its equitable powers.

It is suggested that perhaps the Court's reliance in *Jarvis II* on this statute in order to invoke its equitable powers was not necessary and clearly is not applicable in the majority opinion herein.

It is recognized that the American doctrine of reasonable use of ground water prohibits the transportation of water outside of the source of common supply to the detriment of the other owners of that common supply. By limiting the amount of water that could be transported from this common supply to the historical consumptive use of lands previously used for agricultural purposes, the Court has in effect declared that such use does not constitute damage particularly under the guidelines established in *Jarvis III* because the remaining farmer-user would not be affected any more than if the land were being farmed.

The position taken by this Court in *Jarvis II* provided a very practical solution to a most difficult problem, but it appears that this solution does have precedent from other states which bolsters and supports the approach taken by this Court in *Jarvis II*. For example, the Supreme Court of Utah faced a similar problem in the early 1920's in the decisions of *Horne v. Utah Oil Refining Co.*, 59 Utah 279, 202 P. 815 (1921) and *Glover v. Utah Oil Refining Co.*, 62 Utah 174, 218 P. 955 (1923). It should be initially noted that both of these cases are cited with approval in the *Jarvis II* opinion for the proposition that "percolating waters may not be used off the land from which they are pumped thereby others whose land overlying the common supply are injured," (479 P. 2d at 171).

The *Horne*, *supra*, and *Glover*, *supra*, cases involved a well-

defined artesian basin measuring four blocks by three blocks. The defendant Utah Oil Refining Co. drilled wells within the basin and transported the water several blocks to the north to its oil refining plant. This removal caused injury to the wells and hydrostatic pressure of the remaining overlying owners. The *Horne, supra*, case adopted the general American rule concerning ground water and the doctrine of correlative rights and held (202 p. at 825) that:

> " * * * each proprietor of the land within an artesian district is entitled to water in proportion to the surface area provided he makes beneficial use of it * * * "

The use by Utah Oil Refining Co. was therefore prohibited. Thereafter, Utah Oil Refining Co. purchased lands with the artesian basin and transported away the proportionate share of those owners. This practice was challenged in *Glover, supra*, and the issue was defined by the Court (218 P. 2d at 956) as being:

> " * * * what would constitute an injury to adjoining owners or persons owning water rights within said artesian district?"

The court held that under the rule in the *Horne, supra*, case, the Utah Oil Refining Co. was entitled to a certain amount based upon their land ownership within the artesian district (218 P. at 958):

> " * * * as long as he puts it to a beneficial use, whether he uses it within the district or at some point outside, * * * "

The court rejected an argument that such use away from the land constituted a forfeiture (218 P. at 959) as being:

> " * * * utterly incompatible with the right of private property and the established policy of the state * * * as the rights of others are not injured thereby* * *."

It would appear that the cases absolutely prohibiting conveyances away from the land on which the wellsite is located are

grounded upon a riparian rights doctrine whereby the ground water was in fact interfering with some prior existing surface water rights. See *Smith v. City of Brooklyn*, 18 App. Div. 340, 46 N. Y. S. 141, 54 N. W. 787 (1897). The riparian rights doctrine simply stated is that each riparian owner has a right to waters riparian to his land undiminished in quantity and quality and can use only so much as not to substantially decrease its volume. See *Maricopa County Municipal Water Conservation Dist. No. 1 v. Southwest Cotton Co.*, 39 Ariz. 65, 4 P. 2d 369 (1931); Supplemental decision and rehearing denied 39 Ariz. 367, 7 P. 2d 254 (1932). This same theory appears to have had some influence on the California Supreme Court in their decision in *Katz v. Walkinshaw*, 141 Cal. 116, 70 P. 663 (1902) on rehearing 74 P. 766 (1903) wherein the California Supreme Court identified an artesian belt as being several miles square, and in adopting a rule of correlative rights, prohibited transportation of water " * * * to be used on lands of others distant from the saturated belt of which the artesian water is derived." In fact this theory was one of the bases upon which the *Katz, supra*, decision was distinguished in *Glover v. Utah Oil Refining Co., supra*. In *Glover*, the Utah Supreme Court noted that Utah did not recognize the riparian rights doctrine and that, therefore, there was no absolute requirement that water be returned to the basin from which it was taken. See also *Stauffer, et al. v. Utah Oil Refining Co.*, 85 Utah 388, 39 P. 2d 725)

Arizona, like Utah, has never recognized the riparian rights doctrine. See *Arizona Constitution, Article XVII, Section 1; Brasher v. Gibson*, 101 Ariz. 326, 419 P. 2d 505 (1966). It would therefore appear that the rationale of the Utah Supreme Court is not only applicable but supports the decisions of this Court in *Jarvis II* and *III*

and no legislation would therefore be required to apply the rule adopted by this Court in *Jarvis II* and *III* to the case before this Court, notwithstanding the statement made by the Court in *Jarvis III* (550 P. 2d at 228):

> "It should be immediately understood that the second *Jarvis* decision authorizing Tucson to retire lands from cultivation in the Avra-Altar Valleys and withdraw water for its municipal uses was expressly predicated on equitable considerations, there being no precedent for such a procedure in the American doctrine of reasonable use. * * * "

and particularly when this statement seems to be qualified by the language immediately following:

> " * * * Tucson acknowledged that equitable considerations require that the agricultural users of the water underlying the Avra-Altar Valleys should be no worse off *than they would have been had the lands retired by Tucson remained in private use, dedicated to the cultivation of crops.* * * *"(Emphasis supplied)

This latter statement would appear to clearly support the proposition that no legislation is required because, as stated above, the Court in *Jarvis III* limited Tucson's right to withdraw and transport water from the Avra and Altar Valley and Critical Ground Water Areas to only that amount required by the farmer to grow his crops leaving the remainder thereof in the ground as recharge as it would have been returned by the farmers pumping to the groundwater supply, which in *Jarvis III* the record will disclose amounted to some fifty percent of the water so pumped by the farmers (550 P. 2d at 230).

Accordingly, JARVIS respectfully urges this Court to reconsider the need for legislation and for the reasons stated above clearly state that such legislation is not necessary in view of the *rule of property* established by this Court in the *Jarvis* decisions.

DISCUSSION IV AND V

- IV -

WHETHER OR NOT THE DECISION BY THIS COURT IN *JARVIS II* RELATING TO THE FURNISHING OF WATER TO RYAN FIELD OR PERSONS RESIDING OUTSIDE THE CRITICAL AREA BUT WITHIN THE SAME WATER BASIN OR COMMON SUPPLY FOR ALL PURPOSES EXCEPT AGRICULTURE FROM TUCSON'S WELLS LOCATED ON *OTHER* PARCELS OF LAND WITHIN A CRITICAL AREA HAS BEEN ABROGATED BY THE MAJORITY OPINION IN THIS CASE.

- V -

WHETHER OR NOT A FARMER WHOSE IRRIGATION WELLS ARE LOCATED ON ONE PARCEL OF LAND CAN IRRIGATE HIS QUALIFIED NON-CONTIGUOUS PARCEL OF LAND FROM SUCH WELLS.

The Trial Court in granting its judgment below made this finding:

> "2. Water may be pumped from one parcel and transported to another parcel if both parcels overlie a common basin or supply and if the water is put to a reasonable use."

Although not set forth in the opinion, the record discloses that the trial court at the end of its order cited *Jarvis II* as authority for its order. The majority opinion overrules the trial court's finding and holds on Page 14:

> " * * * Water may not be pumped from one parcel and transported to another *just because both overlie the common source of supply* if the plaintiff's lands or wells upon his lands thereby suffer injury or damage." (Emphasis supplied.)

This we respectfully submit is in direct conflict with *Jarvis II* and therefore definitely needs clarification.

In *Jarvis II* where the Court was confronted with the need to define "the overlying lands", it specifically permitted the City of Tucson to deliver water from its well fields located in the Marana Critical Groundwater area to Ryan Field. This transportation of water was declared legal because Ryan Field overlies the common basin of groundwater from which water was taken by Tucson and deliv-

ered to Ryan Field:

> " * * * Its lands overlie the *Avra-Altar water basin* and geographically it lies within the Marana Critical Ground Water Area so as to entitle it to withdraw water from the *common supply* for all purposes except agriculture. Tucson should not be prohibited from delivering water to Ryan Field for lawful purposes *since the Ryan Field supply is from the common basin over which it lies* and from which it could legally withdraw water by sinking its own wells for domestic purposes." (Emphasis supplied.)

106 Ariz. at 510, 479 P. 2d at 173.

Admittedly Ryan Field was situated within the Marana Critical Groundwater Area. However, the operative fact *was not* that Ryan Field lay within the same Critical Groundwater Area. *It was the fact that Ryan Field overlay the common basin*, which made the withdrawal and delivery to Ryan Field permissible.

This Court stated unequivocably that land overlying the common water basin is entitled to receive water withdrawn from the common supply. Although *Jarvis II* did not involve transportation to land overlying the common basin but outside the critical groundwater area, this Court nevertheless went on in the next paragraph of its opinion to flatly state that Tucson could deliver water to customers lying outside the Critical Area *if* it could show that such customers were on lands overlying the common groundwater basin:

> " * * * Until Tucson can establish that its customers *outside the Marana Critical Ground Water Area* but within the Avra-Altar Valleys' drainage areas *overlie the water basin so as to be entitled to withdraw water from it*, there are no equities which will relieve it of the injunction heretofore issued." (Emphasis supplied.)

106 Ariz. at 510, 479 P. 2d at 173.

It was only after this conclusion by the Court in *Jarvis II* that the Court, invoking its equitable powers authorized Tucson to withdraw and transport out of the Basin and Critical Area

an amount of water equal to the annual historical maximum use upon the former agricultural lands acquired by Tucson. In other words, *it would appear that Tucson could have legally furnished Ryan Field water from its own wells located upon another parcel of land some distance away from Ryan Field without purchasing agricultural land and retiring it from cultivation; and if Tucson had been able to show that customers outside the critical area east of Ryan Field were on lands over the common basin or supply, it likewise could have furnished water to these customers without buying agricultural land and retiring it.*

The common supply or basin concept it appears was upheld in 1939 by the Court in *Adams et al vs. Salt River Valley Water Users' Association*, 53 Ariz. 374, 89 P. 2d 1060. At least it so appears because Justice MacFarland who also was the trial Judge in the *Adams* case in his concurring opinion in *Jarvis I* at Page 393 states:

> " * * * Then, as now, there were many recognized and established water rights in each water basin. For example, in Adams v. Salt River Valley Water Users' Association, supra, this Court recognized the right of the S. R. V. W. U. to pump water to supply irrigation *not only for the lands from under which they were pumped but from other lands in the Project.* * * * " (Emphasis Supplied)

and particularly when he concludes by stating:

> " * * * So Justice Struckmeyer's decision, I think, rightly *limits the question* in the instant case *to the taking of water from critical areas and transporting it to other areas."* (Emphasis Supplied)

While it is true, of course, that in *Adams* there was a contract between the members of the Association and the Association, nevertheless the legality of the contract was upheld by the Court in allowing the withdrawal of water from one parcel of land

and transporting the same to another within the same basin. It would appear therefore that the majority opinion does modify or abrogate the rule in *Adams* unless it can be distinguished from the case at bar by virtue of the contract. The Court can take judicial notice that similar situations are present in Arizona such as in the San Carlos Project. Under the majority opinion a farmer whose wells and lands were outside the Project but within the same basin undoubtedly could complain and enjoin such use within the Project if injured.

This therefore goes into the next question presented: May a farmer whose irrigation wells are located on one parcel of land pump and transport the waters therefrom to another parcel of land being farmed by the same farmer even though it be non-contiguous. The majority opinion would appear to hold that it could not be legally done. Yet again, to the contrary, the Court in *Jarvis II* permitted Tucson to furnish Ryan Field water from its wells located some distance therefrom because as stated by the Court, on Page 173:

> " * * * the Ryan Field supply *is from the common basin over which it lies* and from which it could legally withdraw water by sinking its own wells for domestic purposes." (Emphasis supplied)

The Court can take judicial notice of the fact that many times because of physical conditions or processes of nature over which the farmer has no control it becomes necessary for the farmer to locate his wells where he can obtain the best and cheapest supply of water at an elevation necessary to irrigate his lands in the most practicable and inexpensive manner. Yet the majority opinion herein on Page 12 clearly indicates that the farmer or anyone else is prohibited from following these practices notwithstanding

the fact that the water comes from a common supply and would do violence to no one's rights providing there is a reasonable use made of the water and the method of transportation is not conducted in a wasteful manner.

In *Jarvis I* (Page 389), the Court stated that the State of Arizona as owner or trustee of state school lands has some 8,000 acres under lease and cultivation out of 33,000 acres of fee land in the Avra-Altar Valleys and that in addition it had some 73,000 acres which had not been put into cultivation because of the prohibitions contained in the Ground Water Code. According to the record before this Court it would appear that the State of Arizona either as owner or trustee of state lands also has lands within the critical ground water area some of which have undoubtedly in the past been cultivated.

In the State Land Commissioner's Motion for Rehearing he states in Paragraph 2. C. beginning on Page 2:

> "C. It cannot be determined from a reading of the decision whether the State Land Department can permit the pumpage of water from one parcel of State land and transport the same to another parcel of State land within the same groundwater basin or critical groundwater area when such use is for the benefit of the trust imposed by the Enabling Act and whether or not such use is limited to the legal subdivision of a section of State land upon which the well is situated, or whether or not it may be used on a legal subdivision of an adjoining or contiguous section of State land."

A glaring example of the problem facing the Commissioner and the State Land Department in this particular area is graphically shown by the plat attached hereto as APPENDIX A which shows the well field owned by Cyprus-Pima on state lands in the E½ of Section 2, Township 17 South, Range 13 East, which furnishes water through a pipeline to process the copper ore mined from its state mineral

leased land in the S½S½ of Section 36, Township 16 South, Range 12 East. The well field in Section 2 was formerly held by Cyprus-Pima under Commercial Lease No. 906, the subject matter in *Farmers Investment Company v. Pima Mining Company, et al*, 111 Ariz. 56, 523 P. 2d 487. It will be noted both the wellsite and place of use is within the Sahuarita-Continental Ground Water Basin and the Sahuarita- Continental Critical Ground Water Area.

The area of this plat is clearly shown in the large EXHIBITS D AND G which are of record with this Court. According to the record the intervening state land is not leased to Cyprus-Pima but is leased to ASARCO.

If the majority opinion is correct, then the state is prohibited from receiving any benefits from its mineral lease on Section 36 from its leased wells on Section 2 because under the majority opinion it would be enjoined from any further pumpage for such purposes and places of use. Except for the intervening Section 31 which apparently is fee land, the ownership of the lands where the wells are situate and the place of use are identical and for all purposes should be considered as one parcel although held under separate leases.

This interpretation of the majority opinion as it seems to apply to state lands not only poses a serious question on the use and development of state lands and the waters thereof in the subject area but presents an even more serious situation in the Avra-Altar Valley where the JARVIS farmers are farming some 8,000 acres of state land and are in some instances farming one section of state land from waters pumped from another section of state land which because of soil conditions, topography, etc., are not suitable

for cultivation, yet all the lands are under one ownership (State) and one lessee (farmer) and in some instances are being farmed as a farm unit consisting of state and fee lands, and in some instances the water from wells to grow crops on state lands originates on the lessee's fee land.

The majority opinion therefore would clearly place these farm operations insofar as they relate to the use of agricultural state lands in jeopardy and if the opinion applies it could therefore render some of the Avra-Altar state agricultural leased lands valueless, except for grazing. JARVIS does not believe the Court intended in its majority opinion to virtually sweep these rights and long-time past uses and farm practices "under the rug."

DISCUSSION VI

WHETHER OR NOT THIS COURT'S DECISION IN *STATE V. ANWAY, SUPRA*, AUTHORIZING THE CHANGE IN PLACE OF USE OF IRRIGATED LANDS FROM A QUALIFIED IRRIGATION WELL WHICH NEW PLACE OF USE MAY BE SEPARATED FROM THE WELLSITE HAS BEEN ABROGATED AND REPEALED.

Again, it appears that the majority opinion in effect has repealed the majority opinion in *State v. Anway, supra*, and adopted the dissenting opinion of Justice Phelps wherein he states on Page 780 (349 P. 2d)·

> "It is clear to me that the Bristor case holds that the water must be applied to the soil to which it subjacent."

Again, we do not feel that the majority opinion intended to repeal *Anway* or modify it in any manner. It must be remembered that the Anway lands are in the Avra-Altar Valley and good farm practices many times require that farmlands be rotated in their cultivation and allowed to lay fallow while another parcel of the

same farm is being cultivated and planted to crop. It is also a well-known fact, of which this Court can take judicial notice, that through natural causes beyond the control of the owner it becomes impractical to use the water beneficially or economically for the irrigation of the land supplied by an irrigation well located thereon, and having other land available not previously cultivated, the farmer abandons his old plot of cultivated land and cultivates the new plot of land without any greater water burden on the groundwater supply. It would appear that the majority opinion now makes this common practice illegal.

JARVIS does not believe that the majority opinion so intended to reverse the *Anway* case and declare such change of place of use illegal.

CONCLUSION

The JARVIS farmers were hopeful that the Court's final decision in *Jarvis III* would once and for all finally settle any doubt about the respective rights of the farmers and Tucson in the Avra-Altar Valley and put an end to the long and expensive litigation that has resulted from this conflict, particularly now that Tucson and JARVIS are in the process of applying the guidelines established in *Jarvis III* to some additional 6,000 acres (other than the 3,166 acres involved in *Jarvis III*) formerly farmed in the Avra-Altar Valley and purchased by Tucson as a result of *Jarvis II*. However, as indicated in the beginning the majority opinion would appear to open the door to further problems and possible additional litigation before this Court between Tucson and the JARVIS farmers

either because of the misunderstanding or misinterpretation of the majority opinion or because the majority opinion has actually held what JARVIS fears.

Hopefully JARVIS is wrong in their interpretation and cause for apprehension and hopefully this Court will see fit to clarify the majority opinion and thereby eliminate the concern of JARVIS and the possible problems that might arise in the future.

The last thing the JARVIS farmers want, and we are sure all other parties would join with JARVIS, is a prolonged battle in the legislative halls which could end in very dangerous emergency legislation adversely affecting all concerned, thereby opening the door wide to endless time-consuming and expensive litigation.

The majority opinion on Page 15, after quoting *Jarvis II* states:

> " * * * Those cases are not, however, precedent for a doctrine that a court will prefer one economic interest over another on an ad hoc basis where there are not enough of the material goods of existence to go around. Rather, courts will protect rights acquired in good faith under previous pronouncements of the law. If it is to the State's interest to prefer mining over farming, then the Legislature is the appropriate body to designate when and under what circumstances such economic interest will prevail."

JARVIS urges, however, that these economic interests must be recognized and can see no reason why the rule in *Jarvis II* and *III* cannot be applied to all economic interests without preferring one over the other because it is an equitable rule providing equal protection for all.

Almost since statehood, and particularly since the days of World War I, this great state of ours has been called the "THREE C" state. Its economic success, growth and security has been and is founded on Cotton, Copper and Cattle, and even today statistics

show that Arizona is about to rate fourth in the cotton production of the country, being only behind Texas, Mississippi and California, moving up from fifth place for the previous year. (See Article in *Phoenix Gazette*, Financial Page B-8, Monday, October 11, 1976. See App. C) According to the recent Thirty-second Annual Edition of September, 1976, entitled *Arizona Statistical Review*, published by the Valley National Bank of Arizona, Arizona leads all the other States in copper production and for the past year produced 57.5% of the copper produced in the United States, the closest other state being Utah producing only 12.5% (Page 29). On Page 2 of the *Statistical Review*, attached hereto as APPENDIX B, we find the tables of major sources of Arizona income from 1965 - 1975 and for the year 1975 - 1976: Agricultural production for the year 1975 was: Crop - $564.110.000.00; Livestock - $488,274,000.00, or a total of $1,052,384,000.00. On the other hand on this same page it appears that the value of mineral production for the year 1975 was $1,044,613,000.00.

We therefore see that the "THREE C'S" are about equal in the dollar value of their respective productions for the year 1975, and prior to this time there has never been any real conflict of interest between the "THREE C'S" and the reason for this is simple: The Court can take judicical notice of the fact that for years all of the copper mines were located in the mountain areas of the State and the problem that has arisen herein is due to the fact that since World War II through modern exploration techniques the mines have discovered large deposits of copper ore in the valley fills such as the recent discovery by Conoco of a large deposit of copper ore under the shadows of Poston Butte along the Gila River at Florence. Of course, in order to mine these ores precious water is required and

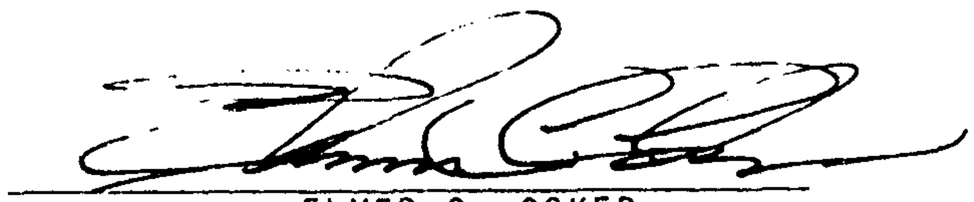
its only source is from ground water.

Today we know that other economic factors are contributing to the welfare of the State such as industry and tourism (*The Arizona Statistical Review* on Page 50, under the table *Tourism and Travel Expense by County 1975-1976*). It is fantastic to note that the total expenditure for the entire State resulting from tourism for 1975-1976 was $2,225,119, 693.00, exceeding the combined income from the "THREE C'S" (APPENDIX B hereto). Likewise, since 1965, industry has taken a prominent place in Arizona's economy. In 1975, as indicated on APPENDIX B industry's output was $1,950,000,000.00.

Thus today we have four major sources contributing to Arizona's economic welfare. The importance of the farmers unfortunately is being continually down-graded by other special interests, not necessarily by any of the above, who believe that the farmers are not substantially contributing to the economy of the State and are wasting water and not putting it to the highest beneficial use and that therefore they should have a low priority on the call for our limited water resources. This in effect is advocated in the Petition to File an *amici curiae* Brief on behalf of the ARIZONA STATE AFL-CIO, and it clearly appears that unless the majority opinion is clarified and modified to reinstate the principle of the *Jarvis* line of decisions legislation will be sought to carry this avowed purpose into effect. *Therein lies the danger!* - because if certain interests can persuade the legislature through panic propaganda that emergency legislation is immediately needed to correct this situation undoubtedly such type of legislation is possible and as a result there will be no end to litigation. We feel, however, that this Court realizing the danger signals that are now flashing

as a result of its opinion of August 26, will clarify its opinion so that once again the rights of all interests to the use of water will be stabilized and not left open to conjecture.

Respectfully submitted this 12th day of October, 1976.



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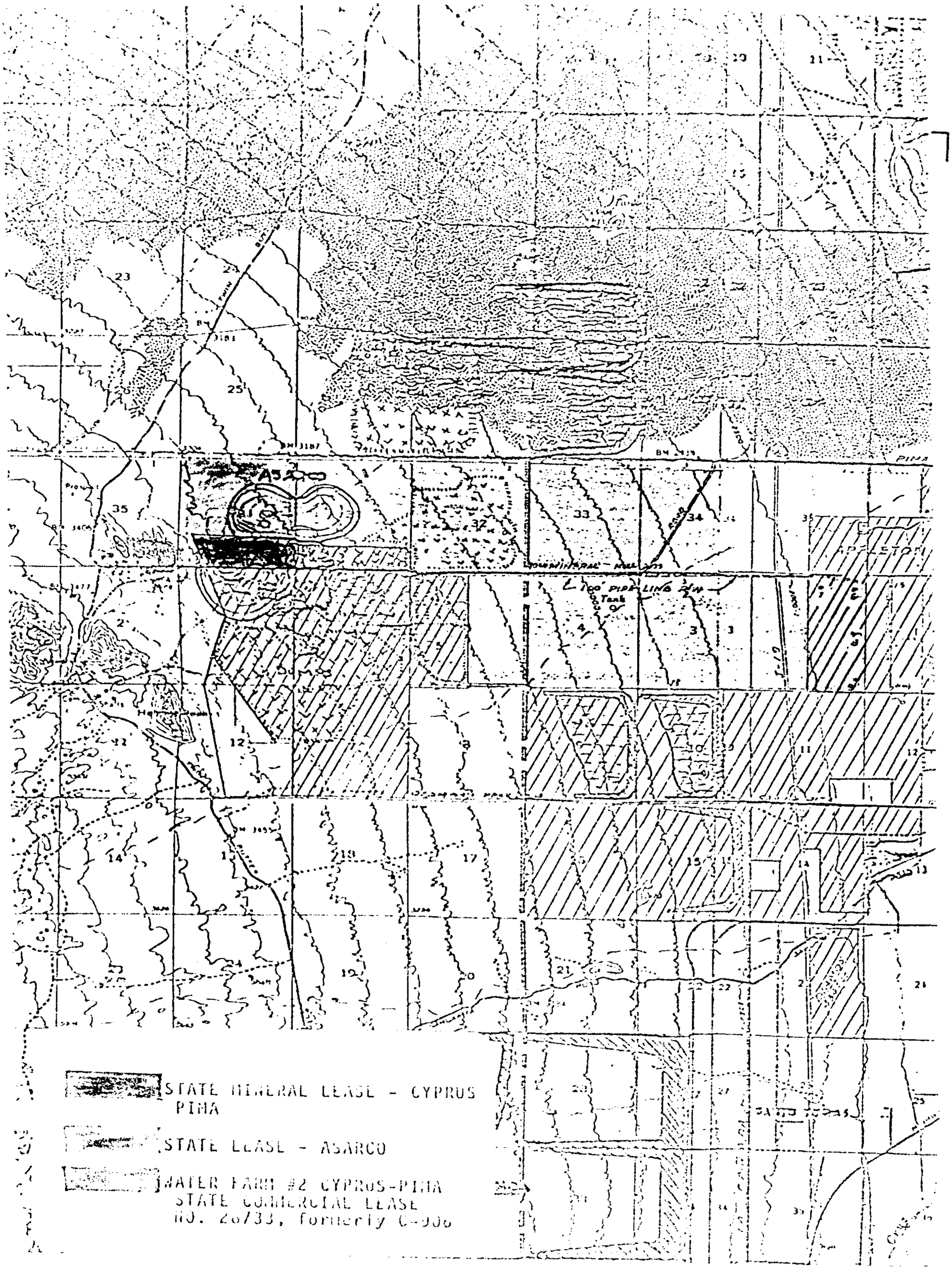
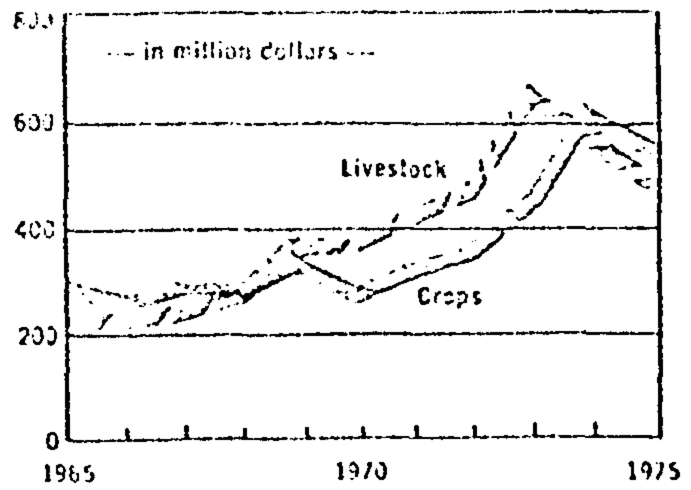


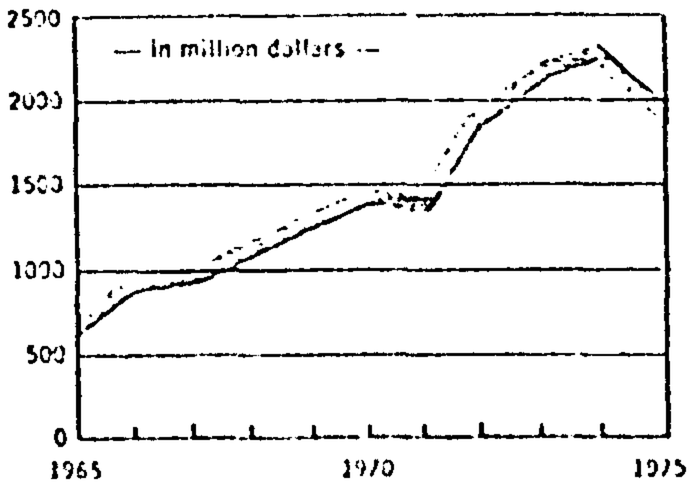
APPENDIX A

MAJOR SOURCES OF ARIZONA INCOME



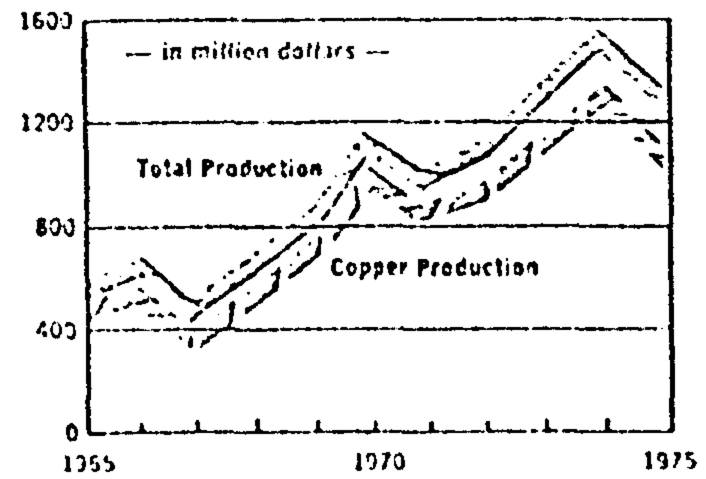
Value of Agricultural Production

Year	Crop Production	Livestock Production
1965	$292,933,000	$212,726,000
1966	270,666,000	230,283,000
1967	286,159,000	246,871,000
1968	286,115,000	285,887,000
1969	323,632,000	369,305,000
1970	271,859,000	373,134,000
1971	313,004,000	416,440,000
1972	351,778,000	483,993,000
1973	450,388,000	679,390,000
1974	624,403,000	585,851,000
1975	564,110,000	488,274,000



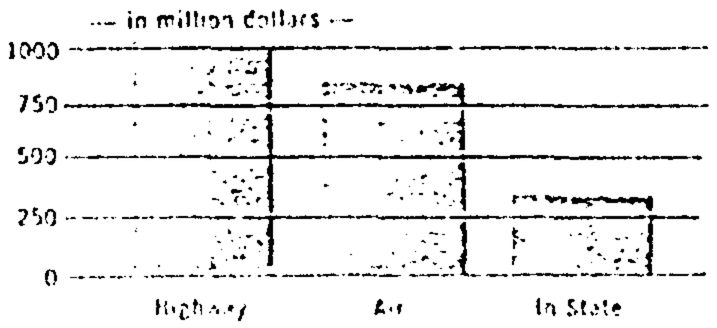
Manufacturing Output (Value Added)

Year	Total Output
1965	$ 717,900,000
1966	926,500,000
1967	995,300,000
1968	1,110,000,000
1969	1,275,100,000
1970	1,436,800,000
1971	1,384,600,000
1972	1,916,000,000
1973	2,160,000,000
1974	2,270,000,000
1975	1,950,000,000



Value of Mineral Production

Year	Total Production	Copper Production
1965	$ 580,092,000	$ 497,991,000
1966	622,079,000	535,004,000
1967	465,255,000	383,591,000
1968	617,543,000	525,566,000
1969	859,303,000	761,840,000
1970	1,166,767,000	1,059,277,000
1971	981,020,000	852,978,000
1972	1,091,004,000	930,419,000
1973	1,301,988,000	1,103,453,000
1974	1,562,234,000	1,327,673,000
1975	1,261,411,000	1,044,613,000



Tourism and Travel Expenditures

	1975 76
Highway Travelers	$1,063,000,000
Air Travelers	868,000,000
In-State Travelers	324,000,000
Total	$2,255,000,000

Source: Bureau of Business and Economic Research, Arizona State University

APPENDIX C

Cotton Ranks Higher

After the state's 1976 cotton crop is harvested, Arizona is expected to rank No. 4 among the nation's cotton-producing states in terms of bale output. Traditionally it has been the nation's No. 5 cotton producer. Page B-8.

Arizona About To Rate No. 4 In Cotton Output

Special to The Gazette

TUCSON--Arizona is on the brink of becoming the nation's No. 4 producer in volume of cotton production, says Dr. B. Brooks Taylor, University of Arizona cotton specialist.

The state's production is expected to exceed 1,100 pounds lint per acre for short staple varieties. Maricopa County Extension Service specialists said last week the Valley's yield should average 1,135 pounds or more an acre.

In bale output, Arizona has traditionally held fifth position, behind Texas, Mississippi, California and Arkansas.

Taylor says federal government estimates of the 1976 crop move Arizona ahead of Arkansas, and California is expected to surpass Mississippi.

APPENDIX C

STATE OF ARIZONA)
) ss:
COUNTY OF MARICOPA)

I **Antonio Bucci** hereby certify:
Name

That I am **Reference Librarian, Law & Research Library Division** of the Arizona State
Title/Division

Library, Archives and Public Records of the State of Arizona;

That there is on file in said Agency the following:

Arizona Supreme Court, Civil Cases on microfilm, Film #36.1.764, Case #11439-2, Amici Curiae Brief of W. W. Jarvis, et al, pages 563-591 (29 pages)

The reproduction(s) to which this affidavit is attached is/are a true and correct copy of the document(s) on file.

Antonio Bucci
Signature

Subscribed and sworn to before me this 12/15/05
Date

Etta Louise Muir
Signature, Notary Public

My commission expires 04/13/2009.
Date

Notary Public State of Arizona
Maricopa County
Etta Louise Muir
My Commission Expires
04/13/2009